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SUPREME COURT OF APPEALS OF VIRGINIA.

MORT *et al.* *v.* JONES *et al.*

Sept. 13, 1906.

[54 S. E. 857.]

On rehearing. Judgment reversed, and cause remanded.
For former opinion, see 51 S. E. 220.

HARRISON, J. This cause was argued and submitted at the term of this court held at Wytheville in June, 1905, and an opinion was handed down reversing the decree appealed from. Upon a petition to rehear, that decree was set aside and the cause was again argued at the same place of session in June, 1906.

After due consideration of the questions involved, we are of opinion to adhere to the conclusions reached upon the first hearing of the cause, and therefore, for the reasons then given and filed with the record, the decree appealed from must be reversed, and the cause remanded for further proceedings to be had in accordance with the views expressed in the said written opinion of June, 1905.

WHITTLE, J. (dissenting). This case is before us on petition to rehear the former decision of the court; and while I quite agree that the decree of the trial court was rightly reversed, I cannot concur in the determination of the majority to adhere to the conclusion heretofore reached.

The former opinion sets out the pleading and salient facts in the case, which need not be repeated. It is sufficient to make plain the legal question involved to say that the intestate, Joseph W. Jones, was twice married, and was survived by two sets of children. Those of the first marriage were adults, while the issue of the second marriage were infants, at the time of their father's death. The intestate owned real estate both in Virginia and Tennessee, and the adult children, in consideration of advancements received by them, entered into contracts with their father relinquishing their expectancy in his entire estate. These contracts, it is admitted, are valid and effectual in Tennessee, but are inoperative in Virginia. *Headrick v. McDowell*, 102 Va. 124, 45 S. E. 804, 65 L. R. A. 578, 102 Am. St. Rep. 843.

In a suit instituted by the infant heirs to partition the Virginia lands, the trial court decreed that it would be inequitable to require the adult heirs to bring their advancements into hotchpot, and still permit the infant heirs to set up the contracts of the adult heirs in bar of their right to participate in the Tennessee lands; and accordingly enjoined the infants and their guardian from taking advantage of these contracts in a suit to partition

the Tennessee lands then pending in the chancery court of the city of Bristol, Tenn.

In the former decision, this court quotes with approval the doctrine announced in *Minor's Conflict of Laws*, that "it is generally admitted that transactions relating to lands or immovable property of any kind are to be governed by the law of the place where the property is situated." And, again, that courts of other states will not "attempt to enforce their own laws with respect to land situated elsewhere, not only because of the spirit of comity and their unwillingness to engage in conduct towards other states which they would not tolerate in other states towards themselves, but also, and perhaps chiefly, because of their utter inability to render any judgment or decree that would be final and effectual to transfer any interest in the land. Instead, therefore, of rendering idle judgments in accordance with their own law, the courts, in dealing with the title to foreign real estate, will seek to determine the rules laid down by the *lex situs* of the land, and will decide in accordance with that law, for to it the parties must finally appear in any event. Thus it comes to be a well-settled principle of private international law, fortified by a great mass of authority, that all questions relating to the transfer of title to immovable property, wherever arising, will be governed by the *lex situs*, the law of the ultimate forum in which all such questions must finally be decided." *Minor on Conflict of Laws*, pp. 28, 29.

Continuing, the court in its opinion says: "So rigidly is this principle enforced that, contrary to the general rule with respect to the limit upon personal covenants, 'the better opinion seems to be that the *lex situs* of the land should govern, so far as covenants of title running with the land are concerned.'" *Id.* s. 185.

"We are therefore of opinion that the corporation court erred in enjoining the infant defendants in this suit, their guardian, and guardian ad litem, from setting up the deeds in controversy in the courts of Tennessee, and in attempting to control the course of procedure in those courts. We are of opinion, however, that justice may be, in part at least, attained without undertaking to interfere with the courts of a foreign jurisdiction, and to that end we think that it is proper for the corporation court of Bristol to ascertain the estate of which Joseph W. Jones died seised and possessed, wherever it may be situated, and then proceed to divide and distribute the estate in Virginia among all their heirs and distributees, without requiring the adult heirs to bring into hotchpot the advancements they have received, and which constitute the consideration for the deeds in controversy, unless it shall be made to appear that the advancements so received, added to their aliquot portion of the estate in

Virginia, shall exceed the shares of the infant heirs in the entire estate, in which event they shall be required to account for so much of such advancements to each of them as will produce equality."

It seems to me that the scheme formulated by the court for the purpose of adjusting equities between the two sets of children in effect perpetuates the error for which the decree of the corporation court of Bristol was reversed.

Section 2561, Va. Code 1904, provides: "Where any descendant of a person dying intestate as to his estate, or any part thereof, shall have received from such intestate in his lifetime, or under his will, any estate, real or personal, by way of advancement, and he, or any descendant of his, shall come into the partition and distribution of the estate with the other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate, real and personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, real and personal."

The statute is mandatory and makes the bringing of advancements into hotchpot a condition precedent to participation in the estate.

The Virginia lands, under the doctrine of *Headrick v. McDowell*, supra, are unaffected by the contracts between the adult heirs and their father, but descend to all the children, adults and infants, alike; and unless we intend to ingraft an important limitation upon section 2561, advancements to the adults must be brought into hotchpot, if they are to share in the partition of the Virginia lands. The circumstance that the adult heirs have voluntarily denied themselves the privilege of inheriting their portion of the Tennessee lands can afford no justification for not subjecting them to the operation of the Virginia statute, so far as the Virginia lands are concerned. The Legislature of Virginia has no extraterritorial jurisdiction to pass statutes affecting real estate beyond its borders, and never intended that section 2561 should apply to the partition of other than Virginia lands. 14 Cyc. 176, n. 94.

The proposed plan involves the assumption by the Virginia court of jurisdiction to control and incidentally diminish the value of the shares of the infants in the Tennessee lands, their title to which is absolute under the laws of that state, and in that way to accomplish indirectly what it has expressly declared that it has no authority to do directly. Stated differently, for this court to hold that the advancements to the adults are not to be brought into hotchpot unless their shares in the Virginia lands shall exceed the shares of the infants both in the Virginia and the Tennessee lands, of necessity deprives the latter of their

property rights under the laws of Tennessee, and by that process equality is attained at the expense of law.

The demonstration of the inexpediency of ignoring the salutary principle that the *lex situs* is paramount in regard to foreign real estate, to correct the supposed hardship of this particular case, would be complete if in this instance the chancery court of the city of Bristol, Tenn., should apply the law of that state to the Virginia lands, on the theory that inequitable consequences would flow from upholding the doctrine of *Headrick v. McDowell*. Such procedure on the part of the Tennessee court would produce an irreconcilable conflict between the courts, incidentally affecting real estate outside of their respective jurisdictions, and resulting in opposing methods for the partition of the same estate.

I am therefore of opinion that the Virginia court, in partitioning the Virginia lands, should be uninfluenced by the rights of the parties with respect to the Tennessee lands.

BUCHANAN, J., concurs.

Note.

Because of the strong dissenting opinion filed in this case, we deem it of importance to the profession that it should be reported in full at this time. We do not propose to go into a discussion here of the value of dissenting opinions, nor of the propriety of publishing them, for that question has already been adverted to in a previous issue of the Register (11 Va. Law Reg. 899) in a note to *Standard Oil Co. v. Commonwealth*. As in that case, so in this, the name and ability of the judge who delivered the dissenting opinion, affords ample excuse for so doing.

WILLIAMS v. KENDRICK.

Sept. 13, 1906.

[54 S. E. 865.]

Contracts—Illegality—Inducing Breach of Trust—Joint Adventure.
—Plaintiff, knowing that R. was the agent and confidential representative of the owner of certain coal lands, induced defendant to go to R. obtain an option through him to purchase the lands for \$8 per acre. Defendant obtained such option by agreeing to give R. one-half of the profits on a sale of the lands plaintiff expected to effectuate at the rate of \$12 per acre to a corporation with whose agent defendant's brother sustained confidential relations, and the sale was effected in this manner. Held, that the transaction amounted to a scheme to pay R. one-half of the profits in order to induce him to be